Supreme Court, U.S.
FILED
DEC 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-606

In the Supreme Court of the United States

OCTOBER TERM, 1987

PHILIP LEE HUTCHINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
ANDREW LEVCHUK
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioner was lawfully sentenced under 21 U.S.C. (Supp. II) 841(b) when he was convicted of crimes that he committed on the day that applicable amendments to that provision took effect.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Burgess v. *Salmon*, 97 U.S. 381 (1878) 6
Russell v. *United States*, 369 U.S. 749 (1962) 7
United States v. *Baresh*, 790 F.2d 392 (5th Cir. 1986) 6
United States v. *Brown*, 555 F.2d 407 (5th. Cir. 1977), cert. denied, 435 U.S. 904 (1978) 6
United States v. *Gibbs*, 813 F.2d 596 (3d Cir. 1987), cert. denied, No. 86-1890 (Oct. 6, 1987) 6
United States v. *Giry*, 818 F.2d 120 (1st Cir. 1987), cert. denied, No. 87-235 (Oct. 6, 1987) 6
United States v. *Todd*, 735 F.2d 146 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985) 6
Weaver v. *Graham*, 450 U.S. 24 (1981) 6

Constitution, statutes, and rule:

U.S. Const.:
Art. I, § 9 (Ex Post Facto Clause) 5, 6, 7
Amend. V (Due Process Clause) 5
Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207:
§ 1002, 100 Stat. 3207-2 to 3207-4 4
§ 1003, 100 Stat. 3207-5 to 3207-6 4
Comprehensive Crime Control Act, Pub. L. No. 98-473, Tit. II, 98 Stat. 1837 ..... 3, 4, 5-6, 7, 8, 9
§ 502, 98 Stat. 2068 (21 U.S.C. 841(b)) 3, 4, 5, 8
§ 503(b)(1), 98 Stat. 2070 (21 U.S.C. 841(b)(1)) 3
§ 503(b)(2), 98 Stat. 2070 (21 U.S.C. 841(c)) 3
Organized Crime Control Act of 1970, 18 U.S.C. 1961 *et seq.* 6
21 U.S.C. 841(a) 3,4

Statutes and rule – Continued: Page

21 U.S.C. 841(a)(1) 7
21 U.S.C. 841(b) 3, 5, 8
21 U.S.C. (& Supp. II) 841(b) 4, 5, 8
21 U.S.C. 841(b)(1)(B) 3
21 U.S.C. (Supp. II) 841(b)(1)(B) 4, 5, 8
21 U.S.C. (Supp. II) 841(b)(1)(C) 4
21 U.S.C. 841(b)(6) 3, 4, 6, 8
21 U.S.C. 846 ..... 1, 3, 7
Fed. R. Crim. P. 7(c)(3) 8

Miscellaneous:

1 C. Wright, *Federal Practice and Procedure: Criminal* (2d ed. 1982) 8

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-606

PHILIP LEE HUTCHINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 818 F.2d 312.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1987. A petition for rehearing was denied on July 22, 1987 (Pet. App. 14-15). The petition for a writ of certiorari was filed on September 21, 1987 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted under 21 U.S.C. 846 of conspiracy to possess marijuana with intent to distribute it (Count One); and an attempt to possess marijuana with intent to distribute it (Count Two).

He was given consecutive sentences of ten years' imprisonment on each count, and he was also fined $125,000 on each count.

1. This case involved a "reverse sting" undercover operation run by the Drug Enforcement Administration (DEA).[1] DEA undercover agents, along with a confidential informant, began in May 1984 to negotiate with petitioner's co-defendants, Robert Rivera and Eugene Petak. Acting on behalf of petitioner, the agents sought to arrange for Rivera and Petak to supply petitioner with 8,000 to 10,000 pounds of marijuana per month. During the negotiations, an undercover agent traveled to Kentucky, where co-defendant James Hutchins (petitioner's brother) showed the agent $150,000 in cash. This step was taken to assure the agent that petitioner and his brother could finance the arrangement. A "test" load of 1,000 pounds was agreed upon, and petitioner engaged co-defendants Randall Moore and James Martin to drive the initial load from Houston, Texas, to Kentucky. Pet. App. 2.

Petitioner was to purchase the first load of marijuana from the agents for $305,000 in cash. Conversations with petitioner and the other conspirators revealed that the object of the conspiracy was the routine purchase and transportation to Kentucky of 2,000 pounds of marijuana per week. A meeting was arranged in Houston on October 12, 1984, for petitioner to make a payment of $305,000 in cash to the agents. Prior to the meeting, petitioner asked the agents to "front" him another 1,000 pounds of marijuana in addition to the 1,000 pounds he would be paying for. The agents agreed to provide him with an additional 500 pounds, for a total delivery of 1,500 pounds. 1 Tr. 87, 121; 4 Tr. 7-8. The meeting was held as scheduled on October 12. When petitioner presented the money, the agents

---

[1] A reverse sting is an undercover procedure in which the undercover agents arrange to sell contraband to the subject of the investigation rather than buying it from him.

seized it and arrested petitioner. Several of his co-defendants were then promptly arrested at another location.

Petitioner was convicted of two violations of 21 U.S.C. 846, which forbids attempts and conspiracies to violate 21 U.S.C. 841(a) and provides that such attempts and conspiracies shall be subject to the same punishment as the underlying substantive offense. Section 841(a) forbids possession of a controlled substance with the intent to distribute it. The punishments for violations of Section 841(a), and therefore Section 846, are set out in Section 841(b) and (c), which was amended by the Comprehensive Crime Control Act (the Crime Control Act), Pub. L. No. 98-473, Tit. II, §§ 502, 503(b)(1), 503(b)(2), 98 Stat. 2068, 2070; those amendments were effective upon enactment. Sections 846 and 841(a) were not amended by the Crime Control Act.

The district court initially sentenced petitioner under 21 U.S.C. 841(b)(6) as it stood prior to the enactment of the Crime Control Act. Section 841(b)(6) had provided that "[i]n the case of a violation of subsection (a) of this section involving a quantity of marihuana exceeding 1,000 pounds, [the violator] shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000." The maximum penalty for an amount not exceeding 1,000 pounds was five years' imprisonment plus a fine of not more than $15,000 (21 U.S.C. 841(b)(1)(B)). The district court sentenced petitioner to ten years' imprisonment on each of the two counts, to run consecutively, and fined him $125,000 on each count.

2. On appeal, petitioner contended, inter alia, that he was unlawfully sentenced under the enhanced penalty provision of Section 841(b)(6). He claimed that (1) with respect to Count One of the indictment, there was no evidence that he conspired to possess more than 1,000

pounds of marijuana, and (2) Count Two of the indictment alleged an attempt to possess exactly 1,000 pounds, not an amount greater than 1,000 pounds. The government replied that the conspiracy explicitly embraced far more than 1,000 pounds and that the reference to 1,000 pounds in Count Two was to the test load, not to the entire amount that was to be transferred as part of the first transaction.

The government also argued that the relevant sentencing provision was not Section 841(b)(6) as it stood prior to the Crime Control Act, but the new sentencing provision adopted by the Act, which was signed by the President (and became effective) on October 12, 1984, the day on which petitioner delivered the money and was arrested. Under Section 841(b), as revised, the maximum penalty for violations of subsection (a) involving marijuana was 15 years in prison plus a fine of not more than $125,000 and a mandatory special parole term (21 U.S.C. (Supp. II) 841(b)(1)(B)). The revised statute provided that the maximum penalty for violations of subsection (a) involving "less than 50 kilograms of marihuana" was five years' imprisonment plus a fine of not more than $50,000 (21 U.S.C. (Supp. II) 841(b)(1)(C)).[2]

The court of appeals determined that there was ample evidence to show that the conspiracy embraced the prospective distribution of more than 1,000 pounds of marijuana (Pet. App. 8). The court further held that because the conspiracy was shown to have continued until after the 1984 sentencing provision became effective, on October 12, 1984, petitioner was subject to an enhanced sentence even greater than the sentence he received. Nevertheless, the court vacated the sentence the district court imposed

[2] The penalty provisions were amended once again in 1986. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1002, 1003, 100 Stat. 3207-2 to 3207-6. The penalty for possession with intent to distribute more than 100 kilograms of marijuana was increased to between 5 and 40 years' imprisonment, plus a fine of up to $2 million.

because "the district court did not sentence [petitioner] under the applicable statutory provisions in effect at the time the crimes for which [petitioner was] charged occurred" (*id.* at 11). Petitioner's conviction was affirmed in all other respects.

On remand, the district court once again sentenced petitioner to terms of ten years' imprisonment on each count, to run consecutively, and fines of $125,000 on each count. In addition, the court imposed a special parole term on Count Two under 21 U.S.C. (Supp. II) 841(b)(1)(B).

ARGUMENT

Petitioner challenges the court of appeals' determination that he should be sentenced under Section 841(b) as amended by the Crime Control Act, rather than under the prior version of Section 841(b). He argues (Pet. 5-8), first, that application to him of the new version would violate the Ex Post Facto Clause of the Constitution (U.S. Const. Art. I, § 9), and second, that he was not on notice that he would be liable to sentencing under the new version, in violation of the Due Process Clause. The court of appeals' decision, however, is correct and does not conflict with that of any other court.

1. The evidence at trial established that the conspiracy continued through the final meeting on October 12, 1984 (Pet. App. 2, 11-12; see, *e.g.*, 4 Tr. 20, 26, 27). The evidence also showed that the meeting and the arrest of petitioner and his co-defendants took place in the afternoon of that day (see 1 Tr. 122 (petitioner's co-defendants were arrested at approximately 4 p.m. Central time, after agents received word of petitioner's arrest)). President Reagan signed the Crime Control Act before 11:20 a.m. Eastern time on that date.[3] The provisions of the Crime

[3] President Reagan's endorsement on the enrolled bill preserved at the National Archives does not indicate the time that Pub. L. No. 98-473 was signed. Records maintained by the White House, however,

Control Act therefore applied while the conspiracy was still in existence and before the attempt was thwarted by petitioner's arrest.

For that reason, the application of the amended statute to the conspiracy charged in Count One of the indictment does not contravene the Ex Post Facto Clause. For a criminal or penal law to be ex post facto, "it must be retrospective, that is, it must apply to events occurring before its enactment." *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981). It is recognized, however, that "because conspiracy is a continuing crime, a statute increasing the penalty for a conspiracy beginning before the date of enactment but continuing afterwards does not offend the Constitution." *United States* v. *Baresh*, 790 F.2d 392, 404 (5th Cir. 1986); *United States* v. *Giry*, 818 F.2d 120, 134-135 (1st Cir. 1987), cert. denied, No. 87-235 (Oct. 6, 1987) (provisions of Crime Control Act apply to conspiracy commencing prior to its enactment but continuing thereafter).[4] The fact

---

include a receipt from the National Archives indicating that the endorsed bill arrived there at 11:20 a.m. Eastern time on October 12, 1984. The Crime Control Act was thus signed into law sometime that morning. Compare *Burgess* v. *Salmon*, 97 U.S. 381 (1878) (refusing to apply criminal penalties of taxing act signed by President in afternoon to commercial transaction completed in morning).

[4] See also *United States* v. *Gibbs*, 813 F.2d 596, 602 (3d Cir. 1987), cert. denied, No. 86-1890 (Oct. 6, 1987) (enhanced penalty provision of former version of 21 U.S.C. 841(b)(6), which took effect on September 26, 1980, applied to conspiracy beginning in 1979 and ending on or about October 6, 1980); *United States* v. *Todd*, 735 F.2d 146, 150 (5th Cir. 1984) (amended version of federal game statute applies to conspiracy commencing prior to its effective date but continuing thereafter), cert. denied, 469 U.S. 1189 (1985).

United States v. *Brown*, 555 F.2d 407 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978), cited by petitioner, is of no help to him. There the defendants had been indicted and convicted under the Organized Crime Control Act of 1970, 18 U.S.C. 1961 *et seq.* The record in that case, however, failed to establish that the violation of that act took place after its effective date.

that petitioner's conspiracy began before October 12, 1984, therefore does not render the application of the penalty provisions of the Crime Control Act an impermissible ex post facto punishment.

Petitioner does not maintain that there is any reason to believe that he delivered the money to the DEA agents before the Crime Control Act became effective. Rather, pointing to the references in the indictment to events "on or about" October 12, 1984, he contends (Pet. 7) that absent a special verdict or specific jury instructions on the issue, there is no way to determine that the jury found that the conspiracy continued through October 12, or that an attempt was committed on that date. The date of the final meeting and the arrests, however, was firmly established at trial. If the jury believed that petitioner was guilty of the conspiracy charged in the indictment—and the jury's verdict showed that it did—there is no room to doubt that the jury found that the conspiracy was in existence on October 12. See, *e.g.*, 4 Tr. 20 (DEA agent testimony as to document, initialed and dated "10-12-84," seized from petitioner at time of his arrest).

In addition to his Ex Post Facto Clause argument, petitioner complains (Pet. 5) that he did not have sufficient notice of the statute under which he was to be sentenced. The superseding indictment, however, described the facts supporting the government's case, and specifically referred to Sections 846 and 841(a)(1), which set forth the conspiracy offense (and underlying substantive offense) with which petitioner was charged and of which he was convicted (U.S. C.A. Br. 17-20). Neither of those provisons was amended by the Crime Control Act. Thus, petitioner knew the law he was charged with breaking and the facts the government would seek to prove at trial; the indictment was more than sufficient to put petitioner on notice of the charges against him so that he could prepare his defense. See *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962).

Petitioner's claim, then, cannot be that he was not informed of the charge against him, but rather must be that he was misled as to the possible punishment by the citation in Count One to former Section 841(b)(6), the penalty provision that was repealed by the Crime Control Act. Petitioner does not contend, however, that he is entitled to an indictment that recites the authority under which he might be sentenced. There is no such requirement, in part because once the substantive provision and the facts are set out the applicable punishment is a question of the law as to which a defendant can inform himself. See 1 C. Wright, *Federal Practice and Procedure: Criminal* § 124 (2d ed. 1982). Accordingly, there is no merit to petitioner's claim that the indictment failed to notify him of the applicable penalty provision, because no such notification was required.

In any event, both the old law and the new authorized the sentence that was imposed on petitioner. The only difference between former Section 841(b)(6) and current law, Section 841(b)(1)(B), is that the enhanced penalty is available under the new law for violations involving 50 kilograms or more of marijuana, while the old law authorized the enhanced penalty for crimes involving more than 1,000 pounds. Count One of the indictment explicitly referred to a conspiracy involving more than 1,000 pounds of marijuana; the proof at trial demonstrated that petitioner's conspiracy embraced amounts well in excess of 1,000 pounds (Pet. App. 7-8). Petitioner would therefore be subject to the same sentence under either version of Section 841(b). Accordingly, the reference in the indictment to former Section 841(b)(6) could not have prejudiced him. See Fed. R. Crim. P. 7(c)(3).

2. Petitioner's sentence on Count Two was likewise lawful because the attempt charged in that count occurred in the afternoon of October 12, 1984, after the time the Crime Control Act became effective. The evidence at trial

BEST AVAILABLE COPY

demonstrated that on October 12, 1984, petitioner attempted to possess 1,500 pounds of marijuana with intent to distribute it: on that day petitioner delivered $305,000 in cash to undercover agents in exchange for an initial load of 1,000 pounds of marijuana and a consignment of an additional 500 pounds (see 4 Tr. 16-20). The delivery of the money—and thus the attempt—occurred at the meeting on the afternoon of October 12, 1984. The attempt therefore took place after the Crime Control Act had gone into effect, and the application of the new sentencing provision to the offense was lawful.

In the case of Count Two, as in the case of Count One, the evidence showed that the offense involved more than 1,000 pounds. Petitioner, the evidence showed, sought to purchase 1,000 pounds from the agents and to obtain an additional 500 pounds on consignment as part of the same transaction. The agents agreed to provide 500 pounds to petitioner on consignment in addition to the 1,000 pounds they agreed to sell him. Therefore, as in the case of Count One, the fine and imprisonment imposed on petitioner was lawful without regard to whether he was subject to being sentenced under the Crime Control Act or the sentencing scheme applicable prior to that time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
ANDREW LEVCHUK
Attorney

DECEMBER 1987

U.S. GOVERNMENT PRINTING OFFICE 1987—202-037/60207